

**STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE COMMISSIONER OF HEALTH**

In the Matter of Bethesda Heritage  
Center

**RECOMMENDED DECISION**

The above matter was the subject of an informal dispute resolution conference conducted by Administrative Law Judge Eric L. Lipman on May 31, 2007. The conference concluded on that date.

Marci Martinson, Unit Supervisor, Division of Compliance Monitoring, PO Box 64900, St. Paul, MN 55164-0900, represented the Minnesota Department of Health ("the Department"). Mary Cahill also attended the meeting and made comments on behalf of the Department.

April J. Boxeth, Voigt, Klegon & Rode, LLC, 2550 University Avenue West, Suite 190 South, St. Paul, MN, 55114 appeared on behalf of Bethesda Heritage Center ("Bethesda" or "the facility"). The following persons also attended the meeting and made comments on behalf of the facility: Carla Kieft, Donna Netland and James Tiede, M.D.

As detailed in the Memorandum that follows, based upon the documentary exhibits, arguments and applicable case law, the Administrative Law Judge makes the following:

**RECOMMENDED DECISION**

- (a) The Commissioner should further recommend that Tag F-309 be set aside, as the evidence does not establish a deficient practice.
- (b) The Commissioner should further recommend that Tag F-248 be set aside, as the evidence does not establish a deficient practice.

Dated this 14<sup>th</sup> day of June, 2007.

/s Eric L. Lipman  
ERIC L. LIPMAN  
Administrative Law Judge

Reported: Digitally recorded (3 wma audio files)  
No transcript prepared

## **NOTICE**

Under Minn. Stat. § 144A.10, subdivision 16 (d) (6), this recommended decision is not binding upon the Commissioner of Health. Further, pursuant to Department of Health Information Bulletin 04-07, the Commissioner must mail a final decision to the facility, indicating whether or not the Commissioner accepts or rejects the recommended decision of the Administrative Law Judge, within 10 calendar days of receipt of this recommended decision.

## **MEMORANDUM**

This matter arises out of a survey at Bethesda Heritage Center (“Bethesda”) in January of 2007. On February 2, 2007, the Minnesota Department of Health (“MDH”) issued a Statement of Deficiencies designating a series of “F-Tags.”<sup>1</sup> These tags set forth areas in which the Department asserts that Bethesda fell below the federal requirements for participation in the Medicare and Medicaid programs. If later sustained, either of these deficiencies could result in the application of sanctions to Bethesda.<sup>2</sup>

### **General Statutory and Regulatory Background**

Participation requirements for skilled nursing and other long-term care facilities in the Medicare program are set forth in 42 C.F.R. Part 483, Subpart B. Provisions governing the surveying of long-term care facilities and enforcement of their compliance with participation requirements are in 42 C.F.R. Part 488, Subparts E and F.

Federal Medicare and Medicaid authorities assure compliance with the participation requirements through regular surveys by state agencies. The survey agency reports any “deficiencies” on a standard form called a “Statement of Deficiencies.”<sup>3</sup>

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<sup>1</sup> See, Exs. D and O.

<sup>2</sup> In advance of the May 31, 2007 dispute resolution conference, the Department withdrew two examples of the earlier Tag 279; and with this reduction, the facility withdrew its objection to Tag 279. See MDH Letter of May 15, 2007 and Boxeth Letter of May 24, 2007.

<sup>3</sup> See, 42 C.F.R. § 488.325 (a) (2005); CMS State Operations Manual, Appendix P, Section IV.

A “deficiency” is a failure to a meet a participation requirement in 42 C.F.R. Part 483.<sup>4</sup> Deficiency findings are organized in the Statement of Deficiencies under alpha-numeric “tags,” with each tag corresponding to a regulatory requirement in Part 483.<sup>5</sup> The facts alleged under each tag may include a number of survey findings, which (if upheld) would support the conclusion that a facility failed to meet the regulatory standards.

A survey agency's findings also include a determination as to the “seriousness” of each deficiency.<sup>6</sup> The seriousness of a deficiency depends upon both its “scope” and its “severity.”<sup>7</sup>

When citing deficiencies, state surveyors use the Centers for Medicare and Medicaid Services (CMS) “Chart of Enforcement Remedies” (otherwise known as the “Scope and Severity Grid” or “the Grid”). The level of deficiency and the enforcement action to be taken is set out on each square of the Grid. Each square on the Grid has a letter designation. A is the least serious, and L is the most serious.<sup>8</sup>

Lastly, Minnesota Statutes §144A.10, Subdivision 16, establishes a process for independent and informal resolution of disputes between survey agencies and health care providers with a participation agreement. In this request for Independent Informal Dispute Resolution, Bethesda submits two F-Tags for review.

### **Tag F-309 – Failure to Provide Necessary Pain Management Services**

#### **A. Regulatory Standards**

Under federal quality of care regulations, the facility must provide the necessary care and services so that each resident might attain the highest practicable physical, mental, and psychosocial well-being.<sup>9</sup> So as to guide the delivery of services the facility is likewise obliged to conduct initial and periodic assessments of the resident that are “comprehensive, accurate, standardized, and reproducible.”<sup>10</sup>

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<sup>4</sup> See, 42 C.F.R. § 488.301 (2005).

<sup>5</sup> CMS State Operations Manual, Appendix P, Section IV.

<sup>6</sup> See, 42 C.F.R. § 488.404 (2005).

<sup>7</sup> See *generally*, Ex. C.

<sup>8</sup> See, Ex. C-4.

<sup>9</sup> See, 42 C.F.R. § 483.25 (2005).

<sup>10</sup> See, 42 C.F.R. §§ 483.20, 483.25 (2005).

## **B. Resident 14**

At the time of the survey, Resident 14 was an 80-year-old male patient with cancer that had earlier metastasized to the bone, brain and spinal cord.<sup>11</sup> His diagnosis also included both impairments in his ability to communicate and severe dementia.<sup>12</sup> A few weeks before the survey, Resident 14 was admitted to the facility for hospice care – at what his family members believed was the end of Resident 14's life.<sup>13</sup>

In the Statement of Deficiencies, the Department itemizes two principal failures with respect to the care of Resident 14. The Department asserts that the facility neither documented the reports of Resident 14's increasing non-verbal symptoms of pain, nor did it undertake new clinical assessments of the Resident's pain once these reports were received.<sup>14</sup>

The troubling feature of these deficiency claims, however, is that all of evidence of the facility's failure to meet the required standards is drawn through the surveyor herself. The surveyor is either the reporter who witnesses the Resident's pain or the person who reports that other staff validated these observations.<sup>15</sup> Notwithstanding a thorough review of the IIDR record, the Administrative Law Judge could not find any data that was independent of the surveyor in support of the deficient practice claims.

In isolation, this fact might not be otherwise remarkable – particularly because of what it means for a facility to fail to keep adequate records or to perform timely assessments. It is to be expected that a facility which has poor record-keeping practices generally, would also fail to have records that detail its lapses. Likewise, it is not unusual that record-keeping deficiencies are noticed in the first instance by the state surveyor. Bringing to light matters which are not otherwise apparent to facility staff is a key purpose, function and benefit of state survey process.<sup>16</sup> Indeed, it is for these reasons that state surveys are performed.

Yet, it is also true that there are features of the IIDR record which lead one to approach the surveyor's description of events in this case with skepticism. The first is that Donna Netland, a nurse who is quoted by the surveyor as having

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<sup>11</sup> See, Ex. F-1a through F-2b; F-12 through F-35; F-42 and F-82.

<sup>12</sup> *Id.*

<sup>13</sup> See, F-42.

<sup>14</sup> See, Ex. D-2 and *Bethesda Heritage Center Survey Exit – January 5, 2007*, at 3.

<sup>15</sup> See, Ex. F-3a through F-8b.

<sup>16</sup> See, *generally*, 42 C.F.R. § 483.1 (b) (2005) (the provisions Part 483 "serve as the basis for survey activities for the purpose of determining whether a facility meets the requirements for participation in Medicare and Medicaid").

acknowledged that Bethesda failed to complete required records,<sup>17</sup> testified earnestly at the dispute resolution conference that the statements that the surveyor attributed to her were “completely false.”<sup>18</sup> Nurse Netland also sought to retract her earlier notation, found at Exhibit F-68, to the effect that “direct care staff reports” indicated that Resident 14 was in pain. Netland asserted that this record entry was based upon a report of the surveyor to her and that this claim was later denied by the nursing assistants who purportedly made these observations to the surveyor.<sup>19</sup> In this context it is worth noting that since the survey team’s exit, Ms. Netland has taken a nursing position with another provider<sup>20</sup> – a fact which makes the suggestion that she is biased in favor of Bethesda less compelling today than if it were still her employer.<sup>21</sup>

Secondly, and especially curious, is that while the surveyor reports an angry outburst from a relation of Resident 14 (as to the difficulty in obtaining proper pain medication for the Resident),<sup>22</sup> none of this antipathy bubbles up anywhere else in the IIDR record. It would stand to reason that if Resident 14’s family genuinely believed that “an act of Congress” was needed before Bethesda would provide pain relief,<sup>23</sup> these sentiments would have appeared somewhere in the record beyond the surveyor’s notes. Yet no such hints are evident in the facility correspondence, nursing notes, hospice documents or other records. To the contrary, as facility witnesses testified at the conference, and as further supported by the underlying records, there was a detailed, continuous and responsive set of care-related exchanges between Bethesda staff and Resident 14’s family members.<sup>24</sup>

Third, the surveyor’s overall description of the delivery of care for Resident 14 is rickety in comparison with the details that are drawn from the underlying record. While the nursing records suggest that Resident 14’s susceptibility to pain was monitored and charted by a variety of different professionals, over time,<sup>25</sup> the surveyor’s report is the sole source of evidence that the facility’s pain management program had collapsed.<sup>26</sup>

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<sup>17</sup> See, Ex. D-6 (“The nurse manager verified that the nurse had not documented or reported the pain and nothing had been done”).

<sup>18</sup> *Compare*, Testimony of Donna Netland.

<sup>19</sup> Test. of D. Netland.

<sup>20</sup> *Id.*

<sup>21</sup> *Compare generally*, *Oak Lawn Pavilion, Inc. v. HCFA*, No. CR474 (Dep’t App. Bd. 199) (the Board compares the motivations of witnesses and other facts surrounding divergent testimony) (<http://www.hhs.gov/dab/decisions/cr-474.htm>).

<sup>22</sup> See, Ex. F-7b.

<sup>23</sup> *Id.*

<sup>24</sup> See, Ex. F-54, F-55, F-57, F-58, F-60, F-62 through F-66, and P-5 through P-7.

<sup>25</sup> See, Ex. F-56, F-59 through F-67.

<sup>26</sup> See, Ex. F-3b through F-6.

At bottom, this case may point up the genuine limitations of the IIDR process in resolving certain fact-bound questions. For very sound policy reasons, Minnesota's IIDR process does not resemble either state contested-case proceedings<sup>27</sup> or the survey deficiency proceedings before federal administrative law judges.<sup>28</sup> While document-rich, the IIDR conferences simply do not include features that are familiar in these other contexts; such as sworn testimony, compelled attendance of witnesses or the cross-examination of government surveyors. Accordingly, if neither consensus nor a good inference can be drawn from the items that are presented at the conference, it may be that a state administrative law judge cannot know a particular survey-related fact with assurance – much less confidently advise the Commissioner on the point.

This is the case here. Faced with the choice between always crediting the surveyor's version of events as true (because it is the surveyor's version), or further pursuit of this Tag, deleting this Tag is the better result. Due to a want of evidence as to a deficient practice, the Commissioner should recommend that Tag F-309 be set aside.

#### **Tag F-248 – Failure to Assist with Access to Activities:**

##### **A. Regulatory Standards**

Federal regulations require participating facilities to “provide for an ongoing program of activities designed to meet, in accordance with the comprehensive assessment, the interests and the physical, mental, and psychosocial well-being of each resident.”<sup>29</sup> Further, within these programmatic offerings, a resident “has the right to [c]hoose activities [and] schedules ... consistent with his or her interests, [i]nteract with members of the community both inside and outside the facility; [and make] choices about aspects of his or her life in the facility that are significant to the resident.”<sup>30</sup>

##### **B. Resident 12**

In the Statement of Deficiencies, the Department asserts that the facility failed to provide timely assistance – specifically, transportation to a then-ongoing

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<sup>27</sup> Compare, Minn. Stat. §§ 14.51 and 14.60 with Minn. Stat. § 144A.10 (16)(c) (2006).

<sup>28</sup> See, generally, State Operations Manual, Exhibit 7A at 5 (“Legal Aspects of the Statement of Deficiencies”) ([http://www.cms.hhs.gov/manuals/downloads/som107\\_exhibit\\_007a.pdf](http://www.cms.hhs.gov/manuals/downloads/som107_exhibit_007a.pdf))

<sup>29</sup> See, 42 C.F.R. § 483.15 (f) (1) (2005).

<sup>30</sup> See, 42 C.F.R. § 483.15 (b) (2005); compare also, 42 C.F.R. § 483.20 (k) (1) (i) (2005) (“the comprehensive care plan “must describe . . . [t]he services that are to be furnished to attain or maintain the resident's highest practicable physical, mental, and psychosocial well-being as required under § 483.25”).

game of dominoes – for a resident who had earlier expressed interest in this activity.<sup>31</sup> The deficiency describes a lack of follow through on the request for assistance.

As aptly summarized by a member of the Department's team at the IIDR conference, this dispute is essentially a "he said – she said" conflict. On the one hand, the surveyor unequivocally reports that she heard Resident 12 make a request to join the domino game;<sup>32</sup> whereas the activity staff member asserts that the Resident had not made a definitive selection one way or the other.<sup>33</sup> In doubt as to Resident 12's preferences and choice on that day,<sup>34</sup> the activities staff member urged Resident 12 to activate the nursing call light, and to request assistance, if she later wanted to join the game in progress.<sup>35</sup>

As with Tag F-309, sustaining the deficiency requires that one credit the surveyor's report of events principally because it is the surveyor's report of events. The rendition is not bounded by other facts in the record.

What is not in dispute is that Bethesda identified Resident 12's interest in simple games before the survey;<sup>36</sup> retains a total of 10 employees to make "sweeps" of the residents' rooms to encourage residents to participate in organized activities;<sup>37</sup> made direct contact with Resident 12 on the day of the survey as to an upcoming set of games;<sup>38</sup> and hosted other residents at this same activity.<sup>39</sup> In this context, the delay in transporting Resident 12 to the dominoes game is more likely attributable to an isolated and wholly innocent miscommunication than it is to any other source.

Due to a want of evidence as to a deficient practice, the Commissioner should recommend that Tag F-248 be set aside.

## **E.L.L.**

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<sup>31</sup> See, Ex. K-2 and *Bethesda Heritage Center Survey Exit – January 5, 2007*, at 18.

<sup>32</sup> See, Exs. K-2 and O-4a.

<sup>33</sup> See, Ex. P-8.

<sup>34</sup> Compare, 42 C.F.R. § 483.15 (b) (2005).

<sup>35</sup> See, Ex. P-8.

<sup>36</sup> See, Ex. O-17.

<sup>37</sup> See, Testimony of Carla Kieft.

<sup>38</sup> See, Exs. O-4a and P-8.

<sup>39</sup> *Id.* Test. of C. Kieft. Whatever one's view as to what happened with Resident 12, this does not appear to be a widespread or systemic defect in routing residents to "quality of life" activities.